No. 85-132

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1985

ALVIN HEMME, ET AL., CROSS-APPELLANTS

v.

UNITED STATES OF AMERICA, ET AL.

ON CROSS-APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ILLINOIS

MOTION TO DISMISS CROSS-APPEAL

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QUESTION PRESENTED

As stated by cross-appellants, the question sought to be presented by their cross-appeal is whether the word "gifts" as used in Section 2010(c) of the Internal Revenue Code of 1954 (26 U.S.C.) includes a "transfer" as used in Section 2035.

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The Acting Solicitor General, on behalf of the United States, respectfully moves the Court, pursuant to Rule 16.1(a) and (d) of this Court's Rules, to dismiss the cross-appeal in this case.

Appellees in *United States* v. *Hemme*, No. 84-1944, have filed a jurisdictional statement pursuant to Rule 12.4, seeking to bring a cross-appeal from the judgment of the district court in their favor, and to present to this Court a statutory issue not ruled upon by that court.

1. The decisions of this Court make it clear that a party may not appeal from a judgment in his favor. *Public Service Commission* v. *Brashear Freight Lines, Inc.*, 306 U.S. 204, 206-207 (1939); *Lindheimer* v. *Illinois Tel. Co.*, 292 U.S. 151, 176 (1934). The judgment of the district court in this case was "in favor of plaintiffs [*i.e.*, cross-appellants] and against defendants." 84-1944 J.S. App. 7a. Indeed, cross-appellants do not question that fact, since they conclude

their jurisdictional statement (85-132 J.S. 19) with the plea that "the judgment of the district court should be affirmed." Their cross-appeal should therefore be dismissed for want of jurisdiction.

2. Appellees seek to present to the Court by their cross-appeal a statutory issue (85-132 J.S. 14-19) unrelated to the statutory issue presented to, but not ruled upon by, the district court. See 84-1944 J.S. 8 n. 7. Absent exceptional circumstances, this Court will not consider issues neither raised nor decided below. See, e.g., *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977). There is, in any event, no merit to the argument. Appellees now contend that since Section 2035(a), both before and after 1976, relates to *transfers* while Section 2010(c) reduces the unified credit if a specific exemption has been claimed for *gifts* made by the decedent, the latter Section does not relate to transactions covered by the former. It is true that Section 2035(a), prior to the 1976 Act, referred to "a transfer * * * in contemplation of his death," and after 1976 to "a transfer" within three years of decedent's death. But a transfer for an adequate and full consideration—*i.e.*, a non-gift transfer—was excluded from that provision by Section 2035(a) prior to the 1976 Act, and by Section 2035(b)(1) thereafter. In other words, Section 2035(a) referred, and refers, to gifts in contemplation of death, or made within three years of death, as this Court has regularly recognized. See *United States* v. *Wells*, 283 U.S. 102, 116-117 (1931); *Allen* v. *Trust Co.*, 326 U.S. 630, 635-637 (1946). More recently, the Court has had occasion to point out that the gift tax (and, necessarily, the specific exemption therefrom) is imposed upon "any gratuitous transfer of any interest in property." *Dickman* v. *Commissioner*, No. 82-1041 (Feb. 22, 1984), slip op. 3. The difference in meaning that appellees seek to draw is non-existent.

It is therefore respectfully submitted that appellees' cross-appeal should be dismissed.

CHARLES FRIED
Acting Solicitor General

AUGUST 1985